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SHARING LIABILITY FOR A REPOSITORY BETWEEN EMPLOYER AND EMPLOYEE

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Abstract

Each research institution that operates a repository has to make a decision whether to allow all its employees to upload their own works (the liberal model) or whether to create a special organizational unit that will review and approve each file shared via repository. This dilemma is accompanied with another important decision that an institution needs to make. Should the institution let its researchers to freely license their works to whichever publisher they choose, or should it apply a managing approach to publication activities? The post will outline legal challenges of both approaches and will formulate practical recommendations, how to formulate internal institutional norms that regulate the institutional repository.

Keywords

Open Access, Repository, Research publications, Research data

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Introduction – The motivation among institutes to set up a repository

More and more Czech public-sector institutions are setting up their own institutional repositories in order to share the results of their scientific and research activities. One of the main reasons for this wave is the adoption of the "Berlin Declaration" on open access to knowledge in natural sciences and humanities, to which the three largest producers of science publications in the Czech Republic have signed up in recent years. The aim of the Berlin Declaration is not to set out rigid, legally-binding and judicially-enforceable legal obligations. Instead the signatories sign up to the idea of publishing "Complete versions" of academic works and "all additional materials", together with a "public licence to use the work" in the repository, which is "supported and maintained by an academic institution, scientific company, government agency or other established organisation".

It must be said that the model of setting up one's own repositories is far more popular among research institutes than placing publications in central publication platforms. The motivation for establishing institutional repositories is to enhance the prestige of individual institutions. It must be said that grant policy in the Czech Republic also generates favourable conditions for the establishment of institutional repositories at a local level.

A dual approach to filling repositories

The way in which institutions fill the relevant institutional repository primarily differs in two parameters at individual levels:

1. Whether the storage of employees' works in the repository is compulsory or voluntary.

2. Whether the administration of individual pieces of output is entrusted to individuals or to a specialised department, for example an institutional library – this is related to the question of whether the author or the institution decides on publication within the open access regime.

Re. Parameter 1: Basic legal foundation concerning the (in)voluntary nature of filling the repository

Digital repositories which are filled on a voluntary basis and which rely on the spontaneous coaction of employees usually only contain an insignificant fragment of the scientific output of an institution.

The current trend is therefore an intensive motivation of employees to submit their results, by imposing the employees' obligations under labour law. The employer relies on the fact that it has the right within the Czech legal environment to exercise "copyright" to the works created by its employees and indeed has the right to impose on employees the obligation to strive for publication in selected periodicals or to keep the results of their work on record in institutional repositories. However, the rights of the employer specified above are not usually unlimited. In practice, the right of the employer might be limited by two circumstances in particular:

a) not all authors of a work are employees of the institution.

Research publications are often created by way of cooperation between research teams from several institutions. Doctorate students without any working relations to the institution become co-authors, or indeed people who are not employed at any research institution (typically, for example, a doctor involved in a clinical study). The employer clearly has no influence over these people and often relies that its own employees will obtain consent from outside co-authors. Mutual communication between co-authors regarding the publication of selected publications conceals many legal pitfalls, which will be considered later.

b) the employer has waived the right to the work or transferred this right to another.

The people that decide to publish in open-access regime and the authors themselves are often unaware of the many different ways that their employer can cede publication rights to third parties. For example, rights to output can even be waived much earlier than the researcher actually begins doing the work. One typical example is the situation in which the employer waives the right to publish results separately from other joint solvers or joint recipients before the start of a specific grant project. Several years usually pass from signing the grant agreement to the publication of results, whereby the wording of the agreement is not usually available to those that administer the institutional repository.

The employer usually transfers the right to exercise property rights to the publisher of the periodical in the interests of publishing results in prestigious magazines or simply waives the exercising of property rights. Certain institutions subsequently endeavour to get the rights back from the institution or try to negotiate conditions with the publisher under which the work can be accessed in open-access[1] regime, often using time embargos. The principle shortcoming of the open-access policy of certain research institutions is that they rest too much on procedures following the publication of an article, whereas it would be more productive to deal with questions of open access before the creation of an actual publication.

A somewhat extreme example of the opposite approach might be, for example, the open-access policy at Harvard University, which leaves the authors in no doubt that their work will be randomly published in the open-access regime if they do not seek a waiver from this policy before the publication of an article[2]. This also applies in the case that members of the academic community are merely co-authors of the chosen texts. Without this waiver, the authors have no right to grant the publisher exclusive rights. It must be said that a prestigious university can afford such an approach without any significant harm to its publication output. Research teams from less prestigious institutions, however, could be practically deprived of the possibility to publish in prestigious publications founded on the principle of subscription according to the rule of "Quod licet Iovi, non licet bovi", if this policy were to be strictly applied. It must be taken into consideration that the interest of research teams in the Czech Republic, for example, in publishing their output in foreign magazines is generally higher than the interest shown by foreign periodicals in publishing output from Czech institutions. These teams cannot therefore dictate the conditions under which their articles are published.

[1] Compare MYŠKA, Matěj, 2014. Vybrané právní aspekty otevřeného přístupu k vědeckým publikacím. *Právní rozhledy*. Vol. 22, issue 18, pp. 611–619. ISSN 1210-6410.

[2] Compare **http://hls.harvard.edu/library/for-faculty/open-access-and-scholarly-publishing/**

Re. Parameter 2: Is the administration of individual output entrusted to individuals or to a specialised department?

The question of eventual responsibility for filling the repository is dealt with differently by individual research institutions. Masaryk University, for example regularly leaves it up to the author of a paper whether to record the work in the repository and whether to publish it in the open-access regime. The university administration has the authority to moderate the manner of publication in the case that an employee publishes content illegally.

By contrast, the Academy of Sciences of the Czech Republic entrusts a specialised employee (an "administrator") from university administration with gathering data and subsequently publication. The author of a text may enter it in the repository himself and indicate his/her wish regarding the manner of publication and the processor confirms the correctness of the settings of the parameters for saving the full text ("If the author saves the file, a trained processor checks the setting of the file and only after this check is the file made accessible[3]").

Both approaches have their pitfalls. The first approach almost unwisely relies on the initiative of the authors and transfers to the authors, almost like passing the buck, the risk of possible breach of the rights of third parties, in particular if such publication is accompanied by a public licence[4]. On the other hand, the centralised approach might be inflexible in the case of co-authors from other institutions, when the repository administrator reaches agreement with co-authors with far greater difficulty than an active member of a research team. A system based on the initiative of the authors must deal with the problem that the person who decides on the publication of the work need not always be a person authorised to have disposal of such a piece of work. On the other hand, a system based on the initiative of the administrator must deal with unclear communication between the authors and the repository administrator.

The most common errors when publishing work

One of the most serious mistakes is, of course, publishing work to which third persons have rights. The explanation below points to errors which individual researchers or administrators might make when publishing work within the regime of open access.

1. Co-authors are not authorised to grant consent to publication in the repository

Plenty has already been written about this problem and research and administrative workers have become far more legally aware in the past five years. Institutions make considerable efforts to prevent legal disputes by negotiating with publishers as the organisations they are most willing to litigate. The aim of this chapter is to point to a number of facts that might be regularly overlooked in practice, even in an effort to proceed in the correct way with regard to the rights of third parties.

[3] See. Maunal of myASEP (repository of Academy of sciences) **https://www.lib.cas.cz/asep/repozitar-asep/vytvoreni-uctu-myasep/** . cit. 19.10.2015

[4] The author considers this in more detail in other articles: KOSCIK, Michal; SAVELKA, Jaromir. Dangers of over-Enthusiasm in Licensing under Creative Commons. Masaryk UJL & Tech., 2013, 7: 201.; KOSCIK, Michal. Creative Commons Will It Do Good in the Czech Republic. Masaryk UJL & Tech., 2008, 2: 61.

In the event that a publication is created by the research teams of several institutions, it is common to ask for the consent of the co-authors before publication in the repository[5]. Here, however, it is important to be aware that there is the considerable likelihood that the co-authors will not be authorised to grant consent because their work on the publication is also work for an employer, to whom the relevant rights truly pertain.

In some cases, the fact that the author (or one of the authors) is an employee of several institutions at the same time might also cause complications, in that such an employee need not actually be fully aware for which of them he/she carried out the specific scientific task, seeing the publication as that of the knowledge he/she acquired in the past.

2. Different understanding of "academic co-authorship" and co-authorship according to the Copyright Act

It is important to be aware that people who take part in research, for example by coming up with an innovative idea, carrying out a large number of measurements, collecting a large sample of patients etc., are generally presented as co-authors. These people, however, are not always the authors of the text itself, which is generally written and edited by younger colleagues. Copyright protects an expression and not the idea itself and a detailed analysis might show that a person correctly stated as a "co-author of the result" in the sense of citation ethics is not a co-author in terms of copyright. If it is not the work of a fictitious author in the sense of copyright regulations, then not even an institution may exercise rights to it as the work of an employee.

3. The copyright problem with Ph.D. students

Consideration is often made of the fact that students are not necessarily employees and that there is no transfer of authorisation to exercise property rights. Students are not employees and their work can only be used "for teaching or for the internal needs" of the institution. This statutory licence is insufficient for the purposes of open-access publication and the consent of students must be treated within a special regime.

4. Copyright associated with typesetting and the issue of preprints

When publishing books and articles, copyright does not relate solely to the words, but to the typesetting, graphics or illustrations, which need not be the intellectual property of the same author. Such graphic elements are usually created by independent specialists working according to the wishes and at the expense of the publisher. An institution cannot therefore automatically share a graphic copy of works already having been published in the open-access regime.

Sharing preprints, meaning the manuscripts of the author without any modifications, presents itself as a solution to this. Nonetheless, it is important to be wary of the myth that preprints do not enjoy legal protection. Only the question of copyright to graphics is really resolved by

[5] For example, the methodology of the AS CR published at: **https://www.lib.cas.cz/asep/repozitar-asep/** "Co-authors may be asked for consent to their work being made accessible within the regime of open access".

publishing preprints. However, the publication of preprints could be at odds with the law in the case that an exclusive licence exists for the publisher to the text in question.

Conclusion

The conclusion can be reached that there are two fundamental risks for institutional repositories. The first risk is the author the second is the institution. The latter might get it wrong, even in efforts to act in good faith and respect the rights of the authors.

If the aim of the Berlin Declaration is to see a shift change in making scientific results accessible, the author would also take the liberty of considering a possible shift change in adding to existing repositories.

Instead of institutions trying to fill repositories by negotiating with licencing houses and forcing their employees to record specific works in local repositories, institutions should concentrate on motivating their employees towards primary publication in open-access sources. It is essentially unimportant in open-access publication whether the publication is actually stored in the repository of the publisher or of the author's institution. In places in which institutional repositories already exist, these would concentrate on obtaining copies of texts already having been published under free licences without the coaction of the actual authors of the publication. Negotiation of time embargos and the publication of domestic authors within the regime of "green open access" would be transferred to a central institution (library), which would agree with the publishing houses on open access to selected publications by domestic authors for IP addresses in the Czech Republic.

The system outlined above would minimise the legal risks caused by action by the authors of a publication which is frequently unpredictable, it would reduce the costs of the institution of administering intellectual property rights in the repository and it would, moreover, achieve considerable savings in scope in light of the central purchase of rights for "green open access".

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